Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

Arthur R. Sorkin,
S. Diane Smith,

Petitioners,

v.

County of Santa Cruz,

Respondent.

Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a State, consistent with the Due Process Clause, deprive an individual of the full use and enjoyment of his home, by authorizing a government entity to place a cloud on the title to his real property for an alleged use violation, without notice and an impartial predeprivation hearing?

2. Does *Romer v. Evans* require a "heightened" or "intermediate" degree of scrutiny where there is an Equal Protection/Takings challenge to a zoning ordinance, based on disparate treatment of a politically unpopular group, among others similarly situated?

3. When a government entity seeks civil sanctions for a criminal offense, does the Due Process Clause require that criminal law standards of statutory construction be used?

PARTIES TO THE PROCEEDING

The petitioners in this proceeding are Arthur R. Sorkin and S. Diane Smith. The respondent is the County of Santa Cruz, which is a political subdivision of the State of California.

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DECISIONS BELOW

The Santa Cruz County Superior Court was filed its amended decision on July 28, 1994, which is reproduced at App. B. The judgment of that court filed on August 4, 1994 is reproduced in App. C. The decision of the California Sixth District Court of Appeal, filed on April 23, 1996 and not reported, is reproduced at App. A. The order of the Court of Appeal denying the petition for rehearing, filed on May 15, 1996, is reproduced in App. D. The order of the California Supreme Court denying review, filed July 10, 1996, is reproduced in App. E.

JURISDICTION

The decision of the California Sixth District Court of Appeal, review of which is sought on petition, was entered on July 28, 1996, rehearing was denied on May 15, 1996, review was denied by the California Supreme Court on July 10, 1996 and this Petition for Writ of Certiorari was filed within ninety (90) days of that date.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment provides in part: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes at issue are Gov. Code § 25132, Civ. Code § 3491, Pen. Code § 373a, Pen. Code § 836.5, and Pen. Code § 853.6. The administrative rules at issue are California Attorney General's Opinions No. 80-607, 63 Ops. Cal. Atty. Gen. 905 (1980) and No. CR 76-23, 60 Ops. Cal Atty Gen. 83 (1977). The relevant portions are set out in Appendices F and H, respectively.

The ordinances at issue are Santa Cruz County Code, Chapters §§ 1.12, 6.08, 6.12, 6.16, 8.30 and 13.10. The relevant portions of these ordinances are set out at Appendix G, respectively.

Page references are to the versions in the Appendix, which is referred to as App. in the text.

STATEMENT OF THE CASE

A. Procedural History

This is an action to abate and enjoin an alleged zoning violation as a public nuisance. This action was originally filed by respondent County of Santa Cruz in the Santa Cruz County Superior Court, requesting abatement, preliminary and permanent injunctions, and civil penalties for an alleged zoning violation. The Superior Court found for respondent and granted a permanent injunction and civil penalties. Judgment was entered August 4, 1994. Petitioners then appealed the judgment of the Superior Court to the California Sixth District Court of Appeal. On April 23, 1996, the Court of Appeal affirmed the judgment of the Superior Court. Petitioners' petition for rehearing was denied on May 15, 1996. Petitioners then sought review by the California Supreme Court. That court denied review on July 10, 1996.

B. The Case

This case involves a dispute between petitioners and the respondent County of Santa Cruz about the interpretation and enforcement of certain zoning ordinances, which are in apparent conflict, as applied to petitioners property located in Santa Cruz County.

Santa Cruz County Code § 13.10.322(b) is a use chart. One line in the chart shows that in the Residential Agricultural ("RA") zone district, kennels for 5 or more dogs, cats, or combinations thereof, subject to the definition in § 13.10.700(K), require a level V use permit. This provision applies to all parcels in the RA zone.

Another line of the § 13.10.322(b) chart states that "animal keeping," subject to § 13.10.643, is a principal permitted use, requiring *no* use approval. There is no definition of "animal keeping" in the Code, but other Code sections include it as a type of small-scale commercial agriculture. § 13.10.643(a)(3) states that, "On a minimum site of ten acres, the number of animals permitted is not limited, except that no more than six brood sows may be kept on any site."

In 1986, petitioners investigated the purchase of a 14+ acre property in Santa Cruz County. The property is located in an isolated, rural area of the Santa Cruz Mountains, approximately 15 miles from "Silicon Valley", where petitioners are employed. Because of the terrain, there are approximately 100 acres vacant around the property, and the nearest house is approximately 1/4 mile away.

Petitioners were specifically looking for a property where they could keep dogs, cats and other animals and engage in commercial animal husbandry. Prior to purchasing the subject property, petitioners contacted the Santa Cruz County Planning department by telephone, and were told that § 13.10.643(a)(3) applied to the subject property, and that an unlimited number of dogs and cats (and other animals) were allowed.

In 1987, based upon complaints about geese, petitioners had their then attorney again contact the Planning Department to

verify that the information they had previously received was correct. He testified at trial that he was given the same information as petitioners had previously received.

Subsequently, and, as the record shows, after intervention by one or more County Supervisors, the Planning Department changed its interpretation and asserted that § 13.10.322(b) limited the number of dogs and cats to 4 on the subject parcel without a level V use permit. At the same time, they also asserted that geese and peafowl were not permitted at all[1].

On 5/16/88 an employee of the County's Planning Department made a warrantless search of Defendants property and, after hearing some dogs barking inside the house, but without actually seeing any dogs, posted on the entrance to Defendants' property a notice of violation of County ordinance (commonly known as a "red tag"). The notice recited violations of County Code §§ 13.10.275, 13.10.322(b), 13.10.640, "keeping peafowl in a residential zone district," and "unlawfully keeping more than 4 adult dogs."

Such a red tag is a citation under Pen. Code. §§ 836.5 and 853.6. The red tag demanded that the violator contact the County officer issuing the citation in order to meet and present evidence that no violation existed. Petitioners responded in writing, and asserted that there was no violation as a matter of law. Petitioners asserted, based on the Planning Departments' own information, that § 13.10.643(a)(3) governed parcels larger than 10 acres, that no use permit was required and that fowl were specifically called out in § 13.10.643.

No further enforcement steps were taken by the County until January, 1990, when "notice of violation," was recorded against petitioners home without notice[2] or a hearing[3], under the

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[1] The County has since conceded that this assertion was incorrect and that geese and peafowl are not regulated, pursuant to § 13.10.643(a)(3).

[2] The notice provisions of § 13.10.285 do not meet the requirements of service, e.g., personal service or service by certified mail, and, therefore, are insufficient. Considering the extent of the potential deprivation, Due Process demands that a *diligent* effort be made to *actually* notify the interested parties.

authority of California Attorney General's Opinion 80-607, 63 Ops. Cal. Atty. Gen. 905, 912 n.4 (1980)[4] and Santa Cruz County Code §§ 13.10.285 and 13.10.288[5]. The record below shows that this notice of violation placed a cloud on the title to petitioner's real property, and was, in effect, a lien. Subsequently, no further enforcement steps were taken by the County until August 1992, when an inspection warrant was executed against the subject property. Petitioners continued to maintain their position that there was no violation, and the County filed this action to abate and enjoin the alleged zoning violation as a public nuisance.

At trial, petitioners took the position that there was no Code violation as a matter of statutory construction and that there had been a denial of due process in the County's handling

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In this case, petitioners never received notice of the intent to record. There is no evidence in the record to show that the notice of intent to record was ever posted on the property, as required by § 13.10.285. There is conflicting evidence in the record as to whether or not notice was ever mailed (by ordinary mail).

3 Even if notice is effected, the Code, and, in particular, §§ 13.10.285 and 13.10.288 do not contain any provisions for a hearing, and, indeed, in this case, no hearing was ever held. § 13.10.285's provision allowing for a meeting to be requested with the Planning Department within 20 days in order to present evidence that a violation does not exist does not meet the Due Process requirements for an impartial hearing; the Code specifies no procedure for such a meeting and the Planning Department is, in any case, the accuser and not impartial.

4 The opinion concludes that a "notice of violation" can be recorded under State law *because* it is not a cloud on title, as a matter of law. However, ample evidence was presented below that it is treated as a cloud *in fact* and that the one that the County recorded on petitioners' home had caused a loan application that was otherwise approved to be rejected.

5 These Code sections were enacted in 1986, but because they had never been published, did not take effect until September 1990, 9 months after the County recorded its notice of violation against petitioners.

of the dispute.[6] Petitioners also asserted that under the County's Code interpretation, there was a violation of equal protection of the law because dogs and cats were singled out for special regulation, even on agricultural parcels where an unlimited number of other animals were allowed without regulation. Petitioners also requested that the court grant affirmative relief as to the cloud on the title to their home, based on the denial of due process involved in the recording of it.

The trial court rejected petitioners argument as to statutory interpretation and ruled that there was no denial of due process or equal protection of the laws. The trial court took the position that a violation of the ordinance was a public nuisance *per se*, requiring only that the existence of a violation be proved. The trial court's judgment granted a permanent injunction, plus civil penalties and costs. The trial court also ruled that it did not have to address the issue of affirmative relief in light of the rest of its decision, and ignored the claim of denial of due process involved in the recording of the notice of violation.

Petitioners then appealed the judgment to the 6th District Court of Appeal. On appeal, petitioners raised the same issues and also raised for the first time a number of pure questions of law based on undisputed facts in the record, under the exception stated by the California Supreme Court in *Hale v. Morgan*, 149 Cal. Rptr 375[7]. Among these were the possibility of damages arising from the denial of due process involved in the cloud on title and the applicability of criminal standards of due process and statutory construction because of an underlying criminal offense.

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[6] Petitioners argued, *inter alia*, that the County had denied petitioners due process by, among other things, failing to obtain a Zoning Administrator determination as to the interpretation of the apparently conflicting Code sections, denying petitioners the right to appeal the Code interpretation to the Board of Supervisors, and failing to obtain Board of Supervisors authorization for the suit as a whole or for the request for civil penalties.

[7] This Court affirmed a similar exception in *Fane v. Edenfield*, 945 F. 2d 1514, affirmed 113 S. Ct. 1792 (1993).

The Court of Appeal accepted the trial court's nuisance *per se* theory, affirmed the trial court's judgment and declined to rule on new questions of law that it asserted has not been properly raised at trial, including some aspects of due process. The Court of Appeal disputed petitioners' argument that any criminal law standards of due process were applicable to this case. The Court of appeal decided that there were no statutory ambiguities and that there was no denial of equal protection or due process. The Court of Appeal also took the position that it did not have to consider affirmative relief or damages arising out of the denial of due process resulting from the cloud on title because it was affirming the trial court.

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING SEIZURE OF REAL PROPERTY WITHOUT NOTICE AND HEARING

As noted above, during an ongoing dispute about an alleged use violation, the County placed a cloud on the title to petitioners home without notice and hearing as a coercive enforcement measure. The Court of Appeal, in affirming the trial court's judgment, declined to order affirmative relief to clear the title and did not consider the issue of damages based on the denial of due process caused by the County's actions.

The Court of Appeal's decision below has the effect of sanctioning a government seizure of real property without notice and hearing, retroactively. This ruling seriously conflicts with

this Court's decision in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), that, absent extraordinary circumstances, seizures of real property without notice and hearing are a denial of due process under the Fifth and Fourteenth Amendments.

The fact that the Court of Appeal ultimately affirmed the decision of the trial court does not negate the denial of due process, "[F]air procedures are not just for the innocent. The question before us is the legality of the seizure, not the strength of the Government's case." *Good* at 505.

The United States Court of Appeals for the 9th Circuit held in *U.S. v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995), and *U.S. v. Real Property Located in El Dorado County*, 59 F. 3d 975 (9th Cir 1995), that the decision in *Good* applies retroactively. Petitioners brought these rulings to the attention of the Court of Appeal, but the Court of Appeal chose not to consider *Good*.

A. *Good* Holds That Interference in Important Non-Possessory Rights of Ownership in Real Property is a Denial of Due Process, Absent Extraordinary Circumstances.

This Court has made it clear that significant interference with rights or ownership, even non-possessory rights, without notice and hearing, is a denial of due process, absent extraordinary circumstances, *Good* at 505.

In *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991), this Court held that a state statute authorizing prejudgment attachment of real property without prior notice and hearing was unconstitutional, absent extraordinary circumstances. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), even the loss of appliances and furniture was significant enough to require a predeprivation hearing.

This Court has identified the right of sale and the right to full use and enjoyment as valuable rights of ownership in real property, *Good* at 501. Even non-possessory interference with these rights is significant. As this Court noted in *Doehr*, non-possessory attachments of real property can have the effect of

impairing the ability to sell the property, can harm the credit rating of the owner, can prevent the owner from using the property as collateral for a loan, or can even place an existing mortgage in technical default. And an inability to refinance or obtain an equity loan could lead to an actual default.

B. *Mathews* Implies that There are no Extraordinary Circumstances Justifying The Failure to Provide Notice and a Hearing.

The right to prior notice and an adversarial hearing is central to due process, not just to protect some abstract right, but to protect the use and possession of property from arbitrary encroachment, *Fuentes* at 80-81, Exceptions are tolerated only in "extraordinary situations where some valid governmental interest is at stake," *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

This Court has set out a three-part inquiry in *Mathews v. Eldridge,* 424 U.S. 319 (1976) for determining if such extraordinary circumstances exist. *Mathews* requires consideration of the private interest affected by the official action, the risk of erroneous deprivation through the procedures used, as well as the value of additional safeguards, and the Government's interest in dispensing with notice and hearing, including the burden of additional procedural requirements.

The right to maintain control over one's home and to be free from governmental interference is an important private interest, *U.S. v. Karo,* 468 U.S. 705, 714-715 (1984). While placing a cloud on the title to petitioner's home doesn't interfere with possession, it still involves the taking of significant rights of ownership, and, as such, is certainly a greater deprivation than the loss of furniture and appliances[8], something requiring notice and a hearing, *Fuentes* at 81, 96.

The risk of erroneous deprivation are great under the

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[8] Petitioner's equity, which has been frozen for 6 years, is several hundred thousand dollars.

County's procedures. The relevant sections of the Santa Cruz County Code, §§ 13.10.285 and 13.10.288, have no provisions for a hearing of any sort[9]. The record below shows that the County does not treat challenges to its statutory interpretation as requiring an administrative hearing, e.g., by the Zoning Administrator under § 13.10.250 and Chapter § 18.10, and the Court of Appeal ruled that those sections were inapplicable. App. A-7.

These procedures are entirely one-sided, and, therefore, provide no protection for the innocent owner. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (1951). "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision making," *Good* at 502. Even the ex-parte procedure in drug forfeitures involving a magistrate, e.g., *Austin v. U.S.*, 113 S. Ct. 2801 (1993), found to be insufficient in *Good*, provides greater protection than those afforded to petitioners by the County.

The County's interest in being able to avoid the requirement of notice and hearing is minimal. The record below shows that the County took two years after putting a cloud on petitioners' title before taking any further enforcement steps. Clearly, time pressure was not an issue preventing notice and a hearing.

The County may well have an interest in preventing the continued use of a property for an alleged illegal use, but the

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[9] On February 1, 1994, the County amended § 1.12.070(D) to provide for a new procedure for code enforcement involving notice and an administrative hearing. App G-4. The fact that the County felt it necessary to amend the code enforcement procedures to provide for notice and a hearing suggests that they were aware that the procedures set forth in §§ 13.10.285 and 13.10.288 do not meet the requirements of due process.

This amendment came into effect prior to the trial in this case, but the new procedures were not followed in this case. In fact, the County treats the procedures in § 1.12.070(D), as amended, as optional, and the procedures set forth in §§ 13.10.285 and 13.10.288 are still used by the County as an alternative remedy, with no notice and hearing.

method employed by the County does not achieve that result; placing a cloud on the title to the property does not have any direct effect on the alleged violation. It does freeze the equity in the property, but since the cloud has no effect on possession, the owner is free to ignore it. Since the alleged violation at issue in this case is a use violation, sale of the property would have the effect of terminating the violation. Since a cloud on title can prevent the sale of a property, *Doehr* at 2113, the County's procedure can have the paradoxical effect of continuing the violation rather than terminating it. As discussed below in II, subsection C, the means selected are not rationally related to the legislative objective, a violation of due process.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE DEGREE OF SCRUTINY IN EQUAL PROTECTION/TAKINGS CASES, WHERE THERE IS DISPARATE TREATMENT OF A POLITICALLY UNPOPULAR GROUP, AMONG OTHERS SIMILARLY SITUATED.

Numerous decisions of the Court deal with regulatory Takings. This Court has consistently required that land use regulations not be arbitrary or capricious, be grounded in reality, and be reasonably related to a legitimate legislative purpose. The California Sixth District Court of Appeal has sanctioned a "rational basis" standard of review in equal protection/takings cases that disregards the factual basis required by *Nebbia v. People of State of New York*, 54 S. Ct. 505 (1934), *Nordlinger v. Hahn*, 112 S. Ct. 2326, and *Heller v. Doe*, 113 S. Ct. 2637 (1993), substituting hypothesis and speculation for fact and reality, and that ignores disparate treatment of those similarly situated, contrary to *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985). The Court of Appeal's standard of review is directly at odds with the this Court's recent decision in *Romer*, which requires that the basis for legislation be knowable and not be based merely on a dislike for the group disadvantaged.

A. *Romer* Requires That The Relation Between The Classification Adopted And The Object To Be Attained Be Knowable.

Petitioners argued below that the legislative restriction on dogs and cats has no rational relationship to other permitted uses similarly situated, e.g., buffalo[10] or geese[11]. The Court of Appeal, despite petitioners' argument, concluded that if some rational basis for the restriction can be *imagined*, then the restriction is legitimate and there is no violation of equal protection. App. A-4. The Court of Appeal then hypothesized that dogs have a tendency to run in packs, make noise, and attack animals. App. A-4. The record below does not contain any factual basis for this hypothesis, and petitioners challenged it in their petition for rehearing, *inter alia*, as having no "rational relationship" to the intended legislative purpose and the disparate treatment in relation to other permitted uses, because other animals, which are not regulated, e.g., geese and buffalo, have the same characteristics and can cause the same problems as dogs and cats

On May 20, 1996, after the Court of Appeal denied petitioners petition for rehearing, this Court decided *Romer v. Evans*, 116 S. Ct. 1620 (1996), which struck down a Colorado constitutional amendment restricting the rights of homosexuals. The decision in *Romer* reiterates and strengthens the rational relationship test in equal protection challenges and implies a higher standard of scrutiny where there appears to be disparate treatment of a politically unpopular group.

Because it is based on hypothesis and speculation, rather than facts, the "rational basis" standard, as applied by the Court of Appeal below, utterly fails to establish a substantial

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10 The County conceded below that petitioners are allowed even "1000 geese" on their property.

11 The County conceded below that petitioners are allowed to have a "herd of buffalo" on their property.

relationship between a legislative restriction and the problem that the restriction is designed to alleviate. The actual relation between the classification and the object to be attained simply cannot be determined, contrary to *Romer* at 1627, which requires that it be knowable. This implies that where a single use is singled out for special regulation among other uses similarly situated or where a politically unpopular group is implicated, *some* inquiry into the reasons is required.

B. *City of Cleburne* Requires A Good Reason For Singling Out A Particular Use For Regulation Among Similar Uses.

This Court held in *City of Cleburne* at 3258, that singling out a particular use for a special use permit, when such a permit is not required of other similar uses, cannot be validated if no good reason can be found why said use would affect the interests of the municipality in a way that the other unregulated uses do not; mere negative attitudes regarding the use are not a permissible basis for treating that use differently.

Similarly, in *Heller* at 2642, this Court noted that a classification must have a rational realtionship between the disparity of treatment and some legitimate government purpose.Legislative restrictions must be based upon reality and some inherent characteristic of the class regulated. "True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation," *Heller* at 2643. And, in *Nordlinger* at 2332, this Court noted that the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational.

Numerous California and federal courts have found a denial of equal protection when the court could not discern a distinction between a regulated use and other uses similarly situated, e.g., see *Elysium Institute, Inc. v. County of Los Angeles*, 232 C.A. 3d 408, 4526 (1991), *Del Monte Dunes v. City of Monterey*, 920 F. 2d 1496, 1508 (1990 9th Cir.); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F. 2d 1398, 1409

(1989 9th Cir); *Lockary v. Kayfets*, 917 F. 2d 1150, 1155 (1990 9th Cir.); *Harrington v. Sonoma County*, 834 F.2d 1488, 1501 (1987 9th Cir.); *Arnel Development Co. v. City of Costa Mesa*, 126 C.A.3d 330, 336 (1981); *Gawizer v. Minier*, 86 C.A.3d 777, 785 (1975); *Carlin v. City of Palm Springs*, 14 C.A.3d 706, 712 (1971).

The Court of Appeal's analysis below is faulty, because it fails to consider whether a "good reason" exists, reflecting some real, pre-existing difference, for singling out dogs and cats for special restriction as compared to other animals *in an agricultural zone*, based on their relative impact on the municipality. A *good reason* is required, not just *any* reason. It is not obvious how, for example, 5 house cats could have a greater impact on the municipality than 1000 geese or a herd of buffalo.

The decision in *Romer* at 1627 states that the relation between the classification adopted and the object to be attained must be knowable and not be adopted with the intent to disadvantage a particular politically unpopular group. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." "If the adverse impact on the disfavored class is an apparent aim of the legislation, its impartiality would be suspect," *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980). "A bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

It is unfortunately true today that dog and cat breeders, and even dog and cat owners, are a politically unpopular group. They are under attack by animal rights activists and pet population activists, such as PETA, who are especially hostile to the breeding of pure-bred dogs and cats. In consequence, many jurisdictions are enacting measures designed to restrict or, even

forbid, the breeding of dogs and cats[12]. The American Kennel Club has even been attacked in the national media.

The County has *no* zone district in which dogs and cats are not singled out for special limitations, not even the *large-scale* commercial agricultural zones intended for *intensive* animal husbandry. This suggests that the aim of the County's zoning legislation is not to regulate land use, but, rather, to disadvantage or harm dog and cat owners and breeders because they are politically unpopular.

The County's regulatory scheme is suspect, because it is both underinclusive and overinclusive. It is underinclusive because it does not include other animals which possess similar characteristics to dogs and cats[13], e.g., buffalo or geese, and it is overinclusive, because it applies equally to a 15 square foot well parcel and a 1000 acre farm, without taking into account the great difference in circumstances between the two[14]. Indeed, the Supreme Court of Georgia, has declared that it is unconstitutionally unreasonable and irrational to limit the number of animals per tract without taking into account the size of the tract, *Avant v. Douglas County*, 319 S.E.2d 442, 443 (Ga. 1984).

Petitioners do not question that regulating actual nuisance is *certainly* a legitimate exercise of police power. However, an arbitrary, numerical restriction is not. The Supreme Court of Kansas, in striking down a 5 cat per parcel limitation, noted that nuisance is not amenable to classification by number or mathematical analysis, and depends, instead on the distinctiveness of the character of the animals and purpose, manner, and consequences of the keeping, *Smith v. Steineauf*, 36 P. 2d 995, 997 (1934). The Supreme Court of Oklahoma in declining to follow *Smith* where there was ample evidence of actual nuisance created by cats, noted that injunctive relief

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12 The County has recently considered such legislation.

13 Except for brood sows.

14 Both are limited to and allowed "4 dogs, cats, or combination thereof."

should be limited to the usage that created the nuisance, *Baudinot v. State*, 340 P.2d 268, 73 A.L.R. 2d, 1027, 1031 (1959). Similarly, the Commonwealth Court of Pennsylvania, in *Com. v. Creighton*, 639 A.2d 1296, 1299 (Pa. Cmwlth 1994), while analyzing a per parcel limitation on cats, noted that proof of actual nuisance was required and that nuisance could not be created by legislative fiat and then banned.

C. *Nebbia* Requires That The Legislative Means Selected Must Have a "Real And Substantial Relationship" To The Object Sought To Be Attained.

Nebbia, at 511, requires that a law cannot be arbitrary or capricious and must have a "real and substantial relationship" between the legislative objective and the means selected to achieve it. In this case, the law in question is a zoning ordinance. That is, it's purpose is to regulate land use so as to group uses according to parcel size, location, topography, population density, and other similar considerations. Within the County of Santa Cruz's zoning scheme, there are a number of agricultural zones where commercial animal husbandry may be practiced, and the number of animals allowed on a single parcel is unlimited. These zones are usually rural, and have a large minimum parcel size[15].

The Court of Appeal's application of "rational basis" leads to absurd results, which their analysis did not address. A 14 acre parcel, such as petitioners', in an agricultural zone is allowed 4 dogs or cats, but can have unlimited number of other animals. 14 acres in a densely populated urban residential area can consist of as many as 70 parcels[16], and, therefore, can have

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15 It was conceded below that petitioners' property lies in one such zone, the "SU" zone, which has the same permitted uses as the "RA" zone, where small-scale commercial agriculture is allowed and where the number of animals (except for brood sows) is unlimited.

16 Five per acre.

as many as 140 dogs and 140 cats,[17] but cannot have most other sorts of animals at all.

The urban density of dogs and cats can be more than 70 times the rural density. There is no reason to believe that urban dogs and cats have different propensities from rural ones or are inherently better behaved. While there may be legitimate governmental interests requiring regulation of dogs and cats, the problems hypothesized by the Court of Appeal below, *i.e.*, dogs running in packs, making noise, and attacking animal, have nothing to do with land use. In fact, the County has specifically addressed the hypothesized problems with a comprehensive scheme of laws dealing with animals, ones that have nothing to do with land use[18], e.g., leash laws[19], noise and barking dog ordinances[20], pooper scooper laws[21], vicious animal laws[22], licensing[23], and, even, kennel and pet shop regulation[24]. These laws have an "essential nexus" to the perceived problems; a

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17 Two dogs and two cats per unit in the R-1 zone with single family housing. The density can actually be much greater in the "R-1", "RB", and "RM" zones, where there are apartment buildings, which allow one dog and two cats *per unit*.

18 Santa Cruz County Code, Title 6, 'Animals'.

19 Santa Cruz County Code § 6.12.020, 'Leash required for dogs off premises'.

20 Santa Cruz County Code § 6.12.090, 'Noisy animals'. However, Santa Cruz County Code §§ 8.30030(B), 'Noise' and 6.12.090(B), 'Noisy Animals', actually exempt noise from commercial agricultural activities, operations or facilities, i.e., animals on a farm, from noise standards.

21 Santa Cruz County Code § 6.12.080, 'Animal defecation prohibited where'.

22 Santa Cruz County Code §§ 6.12.100, 'Harassment, threat or injury by dogs', 6.12.110, 'Dogs killing domesticated animals or other dogs', 6.12.130, 'Livestock--Threat or injury by dogs prohibited', and 6.12.140, 'Vicious animals'.

23 Santa Cruz County Code Chapter § 6.08, 'Licensing'.

24 Chapter 6.16, 'Kennels and Pet Shops', App. G-9, provides for health and safety regulation by the Health Department.

land use restriction based on the "parcel" does not. If problems hypothesized by the Court of Appeal are indeed the object of the special land use restriction in question, then there is certainly no "real and substantial relationship" between the means selected and the object intended to be achieved.

III. THE HEIGHTENED SCRUTINY ISSUE IS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT

In order for the nation's lower courts to properly adjudicate claims that land use regulations lack a rational basis or fail to advance a legitimate state interest, it is critical that they apply the correct degree of scrutiny. The level of scrutiny is a key factor in determining if the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Equal Protection Clause provides protection to property owners from government regulatory schemes. This is clearly shown by the decision below, where the Court of Appeal's use of a "rational basis" level of review easily led to a decision upholding the County's land use regulation, even though the alleged rational basis was only hypothetical and speculative. The legislative scheme was never analyzed for the possible existence of a politically unpopular group or a good reason for the special restriction compared to other uses similarly situated, even though a more detailed analysis of the legislation establishes that there is no "real and substantial relationship" between the object sought to be achieved and the means selected, or a rational relationship to other permitted uses.

This Court has made it clear that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution, *Lynch v Household Finance Corp.*, 405 U.S. 538, 552 (1972). Lower courts are never going to prevent regulatory abuses by government and provide essential protection to private property if they do not give a higher level of scrutiny to the *substance* of the government's action.

Romer implies that a court cannot simply assume the lowest level of scrutiny is correct; the court must, at the very

least, inquire as to whether an "intermediate" or "heightened" level of scrutiny is applicable to a particular case. The Court of Appeal erred in failing to make this inquiry.

This case illustrates the need for a level of scrutiny that looks beyond the hypothetical and speculative to determine that the legislative objective is knowable and that there is a "real and substantial relationship" between the legislative objective and the means selected to achieve it, *Nebbia*, at 511, in light of the actual facts of the situation and the entire regulatory scheme taken as a whole, and that the aim of the legislation is not to disadvantage a politically unpopular group. The appropriate degree of scrutiny under the Takings and Equal Protection Clauses is a matter of exceptional importance and merits review by this Court.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING DUE PROCESS STANDARDS IN QUASI-CRIMINAL CASES

While this case is civil, the offense upon which it is based is criminal. Gov. Code § 25132 declares any violation of a county ordinance a misdemeanor, unless it is specified to be an infraction by local ordinance. California Attorney General's Opinion CR 76-23, 60 Ops. Cal. Atty. Gen. 83 (1977) declares Gov. Code 25132 operative only where the county explicitly declares a violation to be a misdemeanor or infraction. Santa Cruz County Code §§ 1.12.010 declares any violation to be a misdemeanor, except for a list of exceptions that does not include zoning ordinances in Chapter § 13.10. Santa Cruz County Code § 1.12.050 declares any violation to be a public nuisance, and Civ. Code § 3491 and Pen. Code § 373a make a public nuisance a crime.

The trial court below concluded below that all it had to determine in rendering a decision in this civil case was whether or not a violation of the law had occurredunder its nuisance *pr se* theory. App. B-6. The civil and criminal offenses are, therefore, not just the same, within the meaning of *Blockburger*

v. U.S., 52 S. Ct. 180, but are identical.

This case hinges on the meaning of certain words in light of conflicting provisions of the Santa Cruz County Code. This makes the appropriate standard of statutory construction crucial to rendering a decision. Petitioners argued below that, based on the underlying criminal offense, that criminal standards of statutory construction must be applied, especially the rule-of-lenity and the void-for-vagueness test.

The Court of Appeal's decision states that by applying perceived legislative intent[25], it can reconcile the conflicting provisions of the County Code, §§ 13.10.643(a)(3) and 13.10.322(b). It then concludes that this means there is no ambiguity in the Code[26]. As a result, the Court of Appeal did not apply the rule-of-lenity or the void-for-vagueness test.

The Court of Appeal's analysis is faulty. The Court of Appeal's assertion that there is no ambiguity is contradicted by its own observation that there are conflicting provisions that must be reconciled. App. A-3. Since a law can have only one meaning, the highest applicable standard of statutory construction must apply. It is a denial of due process to apply

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25 There is no written legislative history available for the Santa Cruz County Code. The only applicable statement of intent in the Code itself is found in § 13.10.311(d), which states that agriculture is to be liberally construed.

26 As the Court of Appeal noted in its opinion App. A-2, beehives are *enumerated* in § 13.10.643(a)(2), Animal Keeping. § 13.10.322 states that Animal Keeping is a principal permitted use in the "RA" zone, and Animal Keeping is small-scale *commercial* agriculture. But §13.10.322 also states that "bee-keeping, commercial" requires a Level V permit, subject to the definition found in §13.10.700-B (There is actually no definition involving bees, beehives, or bee-keeping in that section). Therefore, §13.10.643 and §13.10.322 contain conflicting provisions.

This is identical to the ambiguity involving dogs and cats that the Court of Appeal said it could resolve by taking into account legislative intent, except that beehives are explicitly enumerated in § 13.10.643. Since it is normally assumed that when a legislature specifically enumerates something, it meant to include it, it is difficult to see how this ambiguity could be resolved by an appeal to legislative intent.

any other standard.

The burden of proof in criminal and civil proceedings are different. However, for a law to have a different *meaning* in a civil proceeding than in a criminal proceeding would be contrary to due process, equal protection, and the void-for-vagueness standard enunciated by this Court in *Grayned v. City of Rockford,* 92 S. Ct. 2294 (1972), and reaffirmed in *Kolender v. Lawson,*103 S. Ct. 1855 (1983). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." ...."A law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

A law must be understandable, not just by a legal scholar, such as an appellate court justice, but by an ordinary person. The mere fact that the Court of Appeal had to take into account its perception of legislative intent in order to reconcile conflicting provisions of the Santa Cruz County Code certainly implies that a person of ordinary intelligence would definitely have a problem knowing what is prohibited. The Court of Appeal erred in not applying the void-for-vagueness test to this case.

This Court has held in *U.S. v. Thompson/Center Arms Company,* 112 S. Ct. 2102 (1992), and *Crandon v. U.S.,* 110 S. Ct. 997 (1990), that the rule of lenity applies to statutory ambiguities and conflicting provisions of law in civil actions based upon underlying criminal statutes. The outcome of *Thompson* depended upon the meaning of the terms "firearm" and "making", within the context of the National Firearms Act; if there was no "making", then there was no regulation; if there was "making", there was regulation. This case has a similar problem of statutory construction. If dogs and cats are "animals", within the meaning of Santa Cruz County Code § 13.10.643(a)(3), then there is no regulation and no per parcel limitation. Otherwise, there is a limit of 4. The Court of Appeal erred in not applying the rule-of-lenity in this case.

This Court, in *Hicks v. Feiock,* 108 S. Ct. 1423 (1988) and *In re Winship,* 90 S. Ct. 1068 (1970), has required that criminal standards of due process, such as proof beyond a

reasonable doubt, be applied to quasi-criminal cases. The decision in *Hicks* stated that, "The labels affixed either to the proceeding or to the relief imposed are not controlling ... and will not be allowed to defeat the applicable protection of federal constitutional law." More recently, this Court in *U.S. v. Halper*, 109 S. Ct. 1892 (1989), reaffirmed the holdings in *Hicks* that the labels "civil" and "criminal" are not controlling.

California courts have also required a heightened standard of due process in quasi-criminal cases. In *Ex parte Gould*, 99 C. 360, the California Supreme Court noted, with reference to contempt of court proceedings, that, "Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to be a misdemeanor." ...."It is none the less a criminal offense that the statutes authorizes it to be punished by indictment, or information, as well as by summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure."

Since in this case the civil offense is identical to the criminal offense, the label "civil" should not have been used by the Court of Appeal to defeat the applicable criminal standards of due process.

CONCLUSION

For the reasons herein advanced, petitioners respectfully urge this Court to grant the Petition for Writ of Certiorari.

Dated: October 7, 1996

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In Propria Persona